Memorandum

To: James Alcorn, Chairman; ClaraBelle Wheeler, Vice Chair; Singleton McAllister, Secretary
From: Brooks C. Braun, Policy Analyst
Date: January 8, 2016
Re: Substantial Compliance – History and Standards

Background: On November 16, 2016 the State Board of Elections asked the Department of Elections to investigate the past practice of the Board vis-à-vis the apparent substantial compliance provision in § 24.2-955.3(E).

History of § 24.2-955.3(E): § 24.2-955.3(E) states that "It shall not be deemed a violation of this chapter if the contents of the disclosure legend or statement convey the required information." This language was first introduced to the *Code of Virginia* in 2005, in a previous version of the Stand by Your Ad law. That language was retained when what is now Chapter 9.5 of Title 24.2 was enacted by the legislature in 2006. A conversation with Chris Piper, former manager of Election Services for the Department and co-writer of the language in question, revealed that the section was intended to function as a substantial compliance provision. Mr. Piper described the motivating incident to be one where a candidate used the disclosure legend "[Name of campaign] paid for this ad." The candidate was accused of violating the provisions of Stand by Your Ad because of the absence of the exact wording "Paid for by [Name of campaign]." Mr. Piper also indicated that to his knowledge the State Board had never been presented with a case that caused it to take up interpreting this subsection. A casual inspection of past board materials from 2011 to the present seems to confirm this.

In its November 16, 2016 meeting the State Board took up interpretation of § 24.2-955.3(E) for what is likely the first time. In that meeting the Board found that an advertisement bearing the disclosure legend "Sponsored by [Name of committee]" conveyed the information required by § 24.2-956 and was therefore in substantial compliance. The Board stopped short of deciding on any further substantial compliance questions until more information about its past practices could be presented.

Suggested Actions: The Department suggests that the Board read § 24.2-955.3(E) narrowly. A narrow reading is good policy for several reasons. First, it would encourage political committees under the scope of Stand by Your Ad to read and carefully comply with the law as written. Second, it would ensure that the information that the legislature intended be communicated to voters is actually communicated. This is to the benefit of voters who have come to expect certain disclosure statements on campaign material. Allowing the universe of acceptable disclosure statements to expand too much could result in voter confusion. Finally, reading the statute narrowly would prevent the exception from becoming so capacious that it could be used for nefarious purposes like concealing the source of funds.

Should the Board agree with this line of reasoning the Department would suggest adoption of the following standard for cases involving substantial compliance: an advertisement is only substantially

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compliant under § 24.2-955.3(E) if the words used in the disclosure statement *unambiguously* convey the information required by Chapter 9.5. Under this standard, advertisement disclaimers must communicate to a reasonable person what is intended by the statute and may not admit to alternative interpretations.

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